

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JACK LEE PERRY,

Plaintiff,

v.

BREVICK, et al.,

Defendants.

No. 2:21-cv-0065 WBS KJN P

FINDINGS & RECOMMENDATIONS

Plaintiff is a state prisoner, proceeding without counsel, with a civil rights action pursuant to 42 U.S.C. § 1983. On July 31, 2023, defendants filed a motion for summary judgment. (ECF No. 56.) Plaintiff did not file an opposition. On November 2, 2021, the court advised plaintiff of the requirements for opposing a motion pursuant to Rule 56 of the Federal Rules of Civil Procedure. See Rand v. Rowland, 154 F.3d 952, 957 (9th Cir. 1998) (en banc), and Klingele v. Eikenberry, 849 F.2d 409, 411-12 (9th Cir. 1988). (ECF No. 29.)

On September 27, 2023, the undersigned granted plaintiff a forty-five days extension of time to file an opposition to the pending motion. (ECF No. 62.) Forty-five days passed and plaintiff did not file an opposition or otherwise respond to the September 27, 2023 order.

“Pursuant to Federal Rule of Civil Procedure 41(b), the district court may dismiss an action for failure to comply with any order of the court.” Ferdik v. Bonzelet, 963 F.2d 1258, 1260 (9th Cir. 1992). “In determining whether to dismiss a case for failure to comply with a

1 court order the district court must weigh five factors including: '(1) the public's interest in
2 expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of
3 prejudice to the defendants; (4) the public policy favoring disposition of cases on their merits;
4 and (5) the availability of less drastic alternatives.'" Ferdik, 963 F.2d at 1260-61 (quoting
5 Thompson v. Housing Auth., 782 F.2d 829, 831 (9th Cir. 1986)); see also Ghazali v. Moran, 46
6 F.3d 52, 53 (9th Cir. 1995).

7 In determining to recommend that this action be dismissed, the court considered the five
8 factors set forth in Ferdik. Here, as in Ferdik, the first two factors strongly support dismissal of
9 this action. The action has been pending for more than two years and reached the stage, set by the
10 court's November 2, 2021 scheduling order (ECF No. 29) for resolution of dispositive motions.
11 Plaintiff's failure to comply with the court's September 27, 2023 order suggests that he
12 abandoned this action and that further time spent by the court thereon will consume scarce
13 judicial resources in addressing litigation which plaintiff demonstrates no intention to pursue.

14 Under the circumstances of this case, the third factor, prejudice to defendants from
15 plaintiff's failure to oppose the motion, also favors dismissal. Plaintiff's failure to oppose the
16 motion prevents defendants from addressing plaintiff's substantive opposition, and would delay
17 resolution of this action, thereby causing defendants to incur additional time and expense.

18 The fifth factor also favors dismissal. The court granted plaintiff ample additional time to
19 oppose the pending motion, all to no avail. The court finds no suitable alternative to dismissal of
20 this action.

21 The fourth factor, public policy favoring disposition of cases on their merits, weighs
22 against dismissal of this action as a sanction. However, for the reasons set forth supra, the first,
23 second, third, and fifth factors strongly support dismissal. Under the circumstances of this case,
24 those factors outweigh the general public policy favoring disposition of cases on their merits. See
25 Ferdik, 963 F.2d at 1263.

26 For the foregoing reasons, IT IS HEREBY RECOMMENDED that this action be
27 dismissed without prejudice pursuant to Federal Rule of Civil Procedure 41(b).

28 ////

1 These findings and recommendations are submitted to the United States District Judge
2 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
3 after being served with these findings and recommendations, any party may file written
4 objections with the court and serve a copy on all parties. Such a document should be captioned
5 “Objections to Magistrate Judge’s Findings and Recommendations.” Any response to the
6 objections shall be filed and served within fourteen days after service of the objections. The
7 parties are advised that failure to file objections within the specified time may waive the right to
8 appeal the District Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

9 || Dated: November 30, 2023

Kendall J. Newman
KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE

Perry65.fr